Supreme Court of the United States.

No. 70. October Term, 1904.

HENNING JACOBSON, Plaintiff in Error,

v.

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE DEFENDANT IN ERROR.

Statement of the Case.

The Revised Laws of Massachusetts, chapter 75, section 137, provide as follows:—

> The board of health of a city or town if, in its opinion, it is necessary for the public health or safety, shall require and enforce the vaccination and re-vaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars.

On the 27th of February, 1902, the board of health of the city of Cambridge, Massachusetts, passed the following vote:—

> Voted to pass the following regulation regarding vaccination, viz.:—
>
> Whereas small-pox has been prevalent to some extent in the city of Cambridge and still continues to increase; and whereas it is nec-

essary for the speedy extermination of the disease, that all persons not protected by vaccination should be vaccinated; and whereas in the opinion of the board, the public health and safety require the vaccination or re-vaccination of all the inhabitants of Cambridge; be it ordered that all the inhabitants of the city who have not been successfully vaccinated since March 1, 1897, be vaccinated or re-vaccinated.

On the 6th of March, 1902, the board of health, acting by its chairman, E. Edwin Spencer, appointed one Felix McGirr, a physician, agent to enforce the vaccination of persons dwelling in Cambridge; and by the following vote of March 19, 1902, ratified this action, thus providing means of free vaccination: —

March 19, 1902.

Voted: Whereas, the following physicians, to wit: Felix McGirr, have been employed by the chairman of this board in the name of the board of health, to enforce the vaccination of persons dwelling in this city in accordance with the vote passed by this board at its special meeting held February 27, it is hereby voted that the action of the chairman be and is hereby ratified, and that the said persons be and are constituted agents of this board for the purpose of vaccination from the dates of their engagement, to wit: Felix McGirr, March 6, 1902, until otherwise ordered, and

Voted, that their compensation for services rendered be fixed at $2 per hour while occupied with vaccinating.

On the 15th of March, 1902, the board of health, by its chairman, called upon the plaintiff in error and required him to be vaccinated, at the same time offering him vaccination free of expense; but he absolutely refused to be vaccinated.

Thereupon the plaintiff in error was duly convicted under the above statute of refusing to comply with such requirement of the board of health, and a fine of five dollars was

imposed upon him. At the trial the plaintiff in error offered to prove, —

(1) What vaccination is — a matter of common knowledge, proof of which was unnecessary and immaterial. (9th offer of proof.)

(2) His own opinion concerning the little value of vaccination, with the historical basis of it. (13th and 14th offers of proof.)

(3) The opinion of experts that vaccination sometimes has injurious or dangerous effects.

This evidence, which might properly have been presented to the Legislature in opposition to the enactment of the above statute delegating power to the board of health to require vaccination in its discretion, but which was incompetent after the Legislature had adjudicated vaccination to be an efficacious preventive of small-pox, being all that the plaintiff in error offered, was excluded. He did not seek to show that in his own case the requirement of the board of health was oppressive, or that by reason of his state of health or other circumstance vaccination would be dangerous to him at the time. He merely attacked the theory of public policy which had guided the Legislature.

In his assignments of error (Record, page 12) he raises in various forms the objection that his conviction was in derogation of his rights under the preamble and the spirit of the Federal Constitution, and effected a denial of due process of law, in violation of the Fifth and Fourteenth Amendments thereof.

Argument.

I.

It is no argument that the conviction was repugnant to the spirit or to the preamble of the constitution. An act of the Legislature of a State and regular proceedings under it

are to be overthrown only by virtue of some specific prohibition in the paramount law.

Forsythe *v.* City of Hammond, 68 Fed. 774, 777.

Baker, J.,—

Courts would find themselves upon a shoreless sea, with neither chart nor compass to direct their course, if they should undertake the task of declaring statutes invalid because of their supposed conflict with the principles of natural justice, or because they were supposed to be violative of the spirit of constitutional governments.

Walker *v.* Cincinnati, 21 Ohio, St. 14, 41.

Scott, C. J.,—

Courts cannot nullify an act of the Legislature on the vague ground that they think it opposed to a general "latent spirit" supposed to pervade or underlie the Constitution, but which neither its terms nor its implications clearly disclose in any of its parts. To do so would be to arrogate the power of making the Constitution what the court may think it ought to be instead of simply declaring what it is. The exercise of such a power would make the court sovereign over both Constitution and people, and convert the government into a judicial despotism. Whilst we declare that legislative power can only be exercised within the limits prescribed by the Constitution, we are equally bound to keep within the sphere alloted to us by the same instrument.

State *v.* Staten, 6 Coldwell, 233, 252.

Smith, J.,—

This court does not entertain the notion that it is authorized to declare a statute void because of the repugnancy to the *spirit* of the Constitution. Considerations of this kind are properly addressed to the legislative body; courts only act when the conflict is shown

with an express provision of the organic law, or with a necessary implication from an express provision.

State *v.* Gerhardt, 145 Ind. 439, 450.
State *v.* Smith, 44 Ohio, St. 348, 374.
People *v.* Fisher, 24 Wend. 214, 219.
Redell *v.* Moores, 63 Nebr. 219, overruling
State *v.* Moores, 55 Nebr. 480.

II.

The Fifth Amendment does not apply to action by a State.

Barron *v.* Baltimore, 7 Pet. 243, 247.
Eilenbecker *v.* Plymouth Co., 134 U. S. 31.
McElvaine *v.* Brush, 142 U. S. 155, 158.
Brown *v.* New Jersey, 175 U. S. 172.
Capital City Dairy Co. *v.* Ohio, 183 U. S. 238.
Lloyd *v.* Dollison, 194 U. S. 445.

It is now too late to argue that the provisions of the Fifth Amendment securing the fundamental rights of the individual as against the exercise of federal power, are by virtue of the Fourteenth Amendment to be regarded as privileges and immunities of a citizen of the United States.

Slaughter-house Cases, 16 Wall. 36.
Maxwell *v.* Dow, 176 U. S. 581.

The privileges and immunities of the plaintiff in error except where he comes in contact with the machinery of the federal government, are those which his own State gives him. In his relations with his State he takes no benefit from the Fifth Amendment or from the preamble of the United States Constitution.

III.

In its unquestioned power to preserve and protect the public health, it is for the Legislature of each State to determine whether vaccination is effective in preventing the spread of small-pox or not, and deciding in the affirmative to require doubting individuals to yield for the welfare of the community.

In re Smith, 146 N. Y. 68, 77.

No one will dispute the right of the Legislature to enact such measures as will protect all persons from the impending calamity of a pestilence, and to vest in local authorities such comprehensive powers as will enable them to act effectively.

Powell *v.* Pennsylvania, 127 U. S. 678, 683.

If a statute is a bona fide exercise of the police power of the State, for the protection of the health of the people, it is not inconsistent with the Fourteenth Amendment.

There can be no doubt that the statute in the present case was enacted as a health measure, and has a real and substantial relation to that object. It cannot be seriously contended that this statute has some ulterior object which it seeks to conceal under a pretended desire to promote the public health.

Compare, by contrast, the statute forbidding the manufacture of cigars in tenement-houses (In re Jacobs, 98 N. Y. 98), the statute forbidding people to give away articles in connection with a sale of food (People *v.* Gillson, 109 N. Y. 389), and the statute forbidding bakers' employees to work more than ten hours a day (People *v.* Lochner, 177 N. Y. 145. Dissenting opinion).

Only in such cases of legislative dissimulation is it held that a law, apparently looking to the protection of the public health and working without undue classification, is a violation of the Fourteenth Amendment.

Mugler *v.* Kansas, 123 U. S. 623.
Sentell *v.* New Orleans, etc., Ry. Co., 166 U. S. 698, 704, 705.
Hawker *v.* New York, 170 U. S. 189, 192.
Holden *v.* Hardy, 169 U. S. 366.

In Lawton *v.* Steele, 152 U. S. 133, 136, it is said, by way of illustration, that compulsory vaccination is a proper exercise of the police power.

It has been directly so held in Morris *v.* City of Columbus, 102 Ga. 792, and State *v.* Hay, 126 N. C. 999.

The courts may not listen to conflicting expert testimony as to the efficacy or hurtfulness of vaccination in general. The Legislature is the only body which has power to determine whether the anti-vaccinationists or the majority of the medical profession are in the right. To paraphrase the language of the court in Powell *v.* Pennsylvania, *supra*, —

The Legislature of Massachusetts, upon the fullest investigation, as the court must conclusively presume, has determined that general vaccination will promote the public health. If all that can be said of this legislation is that it is unwise or unnecessarily oppressive to people in general, their appeal must be to the Legislature or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government. The possibility of the abuse of legislative power does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist. It is not a part of the functions of the court to conduct investigations of fact entering into questions of public policy merely to sustain or frustrate the legislative will

embodied in statutes, as they may happen to approve or disapprove its determination of such questions.

That the Legislature has large discretion to determine what personal sacrifice the public health, morals and safety require from individuals is elementary.

Booth *v.* Illinois, 184 U. S. 425.
Austin *v.* Tennessee, 179 U. S. 343.
Lawton *v.* Steele, 152 U. S. 133, 136.
Mugler *v.* Kansas, 123 U. S. 623.
Fertilizing Co., *v.* Hyde Park, 97 U. S. 659.

IV.

It must be conceded that the Legislature of Massachusetts has power to require the vaccination of its inhabitants and fix appropriate penalties for refusal. The remainder of our argument considers the form of this legislation and its application to the plaintiff in error.

1. The exception of minors and wards from the provisions of the statute, resting upon a reasonable basis of classification, denies to nobody the equal protection of the laws. As observed by the supreme court of Massachusetts, it only limits the liability to a penalty to persons who have a right to control their own conduct. Another section of the statute imposes a penalty upon parents and guardians for neglecting to cause the vaccination of their children and wards (R. L. chap. 75, § 136).

2. The statute properly left discretion with the board of health to determine under what conditions it was necessary to enforce vaccination. The undisputed condition on which the board based its action was the prevalence and continual spread of small-pox in the city. Thus the general order of the board, passed Feb. 27, 1902, is not open to objection.

The advantage of uniform and general laws is best at-

tained by vesting discretionary power in local administrative bodies.

Wilson *v.* Eureka City, 173 U. S. 32.
See *Health Department v. Rector of Trinity Church*, 145 N. Y. 32,

in which a statute was upheld requiring owners of tenement houses to furnish water at one or more places on each floor whenever directed to do so by the board of health, although it was argued that the exercise of the police power to require water for health and protection against fire could be properly manifested only in a statute containing details and limitations.

A perfectly equal law may easily be the most unjust; for example, a statute requiring the vaccination of all the inhabitants of Massachusetts during the first week in November of every fifth year, irrespective of the presence of small-pox and without regard to individual conditions of health, or a set of rules and regulations made by the Legislature itself, which must necessarily be more or less inelastic, would be far less just than this statute which delegates discretion to local public officials.

It is wise legislation which leaves the necessity for general vaccination and the decision as to the time for vaccination of each individual to the local boards of health. If they act in an arbitrary manner, depriving any individual of a right protected by the Fourteenth Amendment, their action in such individual case is void. Thus the law in general stands, but particular cases of oppression may be prevented.

Compare

Yick Wo *v.* Hopkins, 118 U. S. 356,

and

Jew Ho *v.* Williamson, 103 Fed. 10,

with

Williams *v.* Mississippi, 170 U. S. 213.

See *Ex parte* Virginia, 100 U. S. 339,
Carter *v.* Texas, 177 U. S. 442,
Tarrance *v.* Florida, 188 U. S. 519.

3. The order of the board of health is clearly within the authority of the statute.

All the cases holding orders requiring vaccination to be invalid are decided on the ground that the orders were broader than the authority given by statute.

In Mathews *v.* Board of Education, 127 Mich. 530, the board of education, under general statutory power to "do all things needful and desirable for the maintenance, prosperity and success of the schools," made a rule that no pupil should be admitted to a public school who had not been vaccinated or otherwise secured against small-pox. There was no statute specifically authorizing such rule. A majority of the court held that a writ of mandamus should issue to compel the admission of the petitioner's unvaccinated children to the schools, it appearing that there was no small-pox in the city. The court said: —

> It was not a question as to what the Legislature might do, or whether the Legislature could confer this power upon the school board. The board had not the power to change the conditions established by law, as to who should attend school, by passing a general continuing rule excluding children from the public schools until they complied with conditions not imposed by the Legislature, although a rule requiring children to be vaccinated as a condition of attending school temporarily during an epidemic, would be authorized.

In Potts *v.* Breen, 167 Ill. 67, it appeared that the board of health was authorized to make such rules and regulations as they might from time to time deem necessary for the preservation or improvement of the public health. Without

further authority than this, they passed an order permanently excluding from the public schools unvaccinated children. Small-pox did not exist in the community, and there was no cause to apprehend that it was likely to become prevalent. There were no grounds upon which the board could have had any reasonable belief that the public health was in any danger whatever. The court held, upon a petition for mandamus to compel the admission to school of children who were not vaccinated, that the order was not authorized by the statute, there being no emergency requiring the board of health to take action. The court observed that if there had been an emergency or if the Legislature had expressly conferred upon the board of health the power exercised by it, the result would have been different.

State *v.* Burdge, 95 Wis. 390, was a case exactly similar to Potts *v.* Breen, *supra*. There was no epidemic of small-pox in or near the city, and the State board of education had no belief or apprehension that it was prevalent in the city or approaching it; yet by an arbitrary order of the board of education, under a rule of the board of health, with no statute upon the subject, the board excluded from the schools every child who did not produce a certificate either of successful vaccination or that it had been vaccinated twice within the last three months. Writ of mandamus issued.

See also Lawbaugh *v.* Board of Education, 177 Ill. 572.

In *In re* Smith, 146 N. Y. 68, the board of health had authority to require the isolation of all persons and things arriving from infected places or which from any cause were liable to communicate contagion; and in the presence of great and imminent peril to public health, by reason of impending pestilence, had authority to take such measures for

the preservation of public health as should be deemed necessary for the public safety and health. There was an epidemic of small pox in a certain ward of the city. The health commissioner thereupon made a rule that any person refusing to be vaccinated should be quarantined until he consented to such vaccination. The authorities quarantined the petitioner, an expressman, in his house, because he refused to be vaccinated, although he was not infected and had not been exposed. Upon *habeas corpus* he was released, the court holding that the rule was broader than was authorized by the statute, since there was no authority of law to require vaccination, and the facts did not show any ground for belief that the petitioner was liable to spread contagion.

In Wong Wai *v.* Williamson, 103 Fed. 1, the board of health of San Francisco, under a statute giving it general control of all matters pertaining to the protection of the lives and health of the inhabitants, adopted an order declaring its belief in the existence of bubonic plague in the city, and prohibiting any Chinese from leaving the city without first being inoculated with a certain serum called Haffkine Prophylactic. There was no special legislative authority for dealing with bubonic plague. The court held that the order was void, having no reasonable relation to the protection of the health of the inhabitants of the city, since it appeared as a fact that the serum was not a preventive after a person had been exposed to the disease, but that giving it to a person exposed was dangerous to life. An order requiring it to be given to all Chinese before leaving the city where the plague was supposed to be, did no good as to those not infected and did harm to those who were infected. It therefore had no relation to the protection of the health of people in the city. The Chinese might stay in the city whether infected or not, without being inoculated or quarantined.

Compare similar quarantine regulations held to be unauthorized, because broader than any statutory basis for them.

Wilson *v.* Alabama, etc., R.R. Co., 77 Miss. 714.
Hurst *v.* Warner, 102 Mich. 238.

Even without express statutory authority, if small-pox is prevalent it is held that a board of health may require vaccination as a condition of attending school.

Duffield *v.* Williamsport School District, 162 Pa. 476.

In this case, there being small-pox in the city and an epidemic in places near by, the board of health, although there was no statute dealing with the subject, required vaccination as a condition of attending school, and provided free vaccination for those unable to bear the expense. The rule was not enforced against those who were not in a condition of health to undergo vaccination. The court refused a writ of mandamus to compel the admission of the petitioner's children, on the ground that in a time of epidemic this was a reasonable regulation under the general powers of the board of health.

To the same effect are

Field *v.* Robinson, 198 Pa. St. 638.
State *v.* Board of Education, 21 Utah, 401.

All such orders, passed, as in the present case, in the exercise of special authority from the Legislature, have been sustained by the State courts wherever their validity has been questioned.

Blue *v.* Beach, 155 Ind. 121, is the leading case upon this point, discussing all the prior cases.

In Bissell *v.* Davidson, 65 Conn. 183, the school committee of a city, under a statute giving it power to require that every child should be vaccinated before being permitted to attend the public schools, made a rule excluding all pupils unless they had been properly vaccinated, and providing free vaccination for all who were unable to pay for it. A writ of mandamus to require the admission of unvaccinated children was denied. The court held that the power given by the statute was reasonably exercised, and that the reasonableness of the statutory requirement was a question exclusively for the Legislature, and that the statute did not deprive the plaintiff of any right without due process of law.

In Morris *v.* City of Columbus, 102 Ga. 792, a statute authorized every city to require vaccination of all its inhabitants. A city ordinance of Columbus required vaccination within ten days of every person over two years old, except those who had been successfully vaccinated within seven months, or were immune, or in such a state of health that vaccination would be dangerous. Held, that the ordinance with its exceptions was a reasonable exercise of the power conferred by the Legislature, and that neither the statute nor the ordinance was in violation of constitutional limitations.

In State *v.* Hay, 126 N. C. 999, a statute authorized towns and cities to make such regulations for the vaccination of their inhabitants, under the direction of the board of health, and to impose such penalties as they deemed necessary to protect the public health. An ordinance of the town of Burlington required all citizens not successfully vaccinated within three years, to be vaccinated within four days; all persons refusing, to incur a penalty of a ten-dollar fine or imprisonment for thirty days. The defendant refused to be vaccinated, for the reason that he had been advised and believed that it would be dangerous for him by reason of his physical condition. At the trial, however, the defendant did not make his physical condition a ground of defence. The

statute and ordinance were held to be constitutional, the court saying: —

> If a people can draft or conscript its citizens to defend its borders from invasion, it can protect itself from the deadly pestilence that walketh by noonday by such measures as medical science has found most efficacious for that purpose.

The court observed that if the jury had found that the defendant's health was in such condition that it would be unsafe for him to submit to vaccination, that would be a sufficient excuse for his non-compliance, since to vaccinate him under such conditions would be an arbitrary and unreasonable enforcement of the statute.

See also Abeel *v.* Clark, 84 Cal. 226.
State *v.* Bell, 157 Ind. 25.
State *v.* Zimmerman, 86 Minn. 353.
Matter of Walters, 84 Hun. 457.

4. The action taken by the board of health in the case of the plaintiff in error did not infringe his rights under the Federal Constitution.

It is conceded that arbitrary action by the board of health, "with evil mind," might result in a denial of due process of law. If they picked out one class of persons arbitrarily for immediate vaccination, while indefinitely postponing action toward all others, or if they abused their discretion as to time and manner of proceeding, by requiring everybody to be vaccinated at a certain time, without regard to the state of his health, their action might be in violation of the Fourteenth Amendment.

Yick Wo *v.* Hopkins, 118 U. S. 356, 373.
Wong Wai *v.* Williamson, 103 Fed. 1.
Jew Ho *v.* Williams, 103 Fed. 10.
Williams v. Miss., 170 U. S. 213.

But there is no suggestion of arbitrary conduct. It is not even hinted that in the exercise of their discretion they failed to make proper discrimination as to temporary conditions. If there were special reasons why the plaintiff in error could not be vaccinated at the time required by the board of health, he should have made them a ground of his refusal; and, if the board neglected to consider them, a defence to his prosecution.

State *v.* Hay, 126 N. C. 999.
See Penn. R.R. Co. *v.* Jersey City, 47 N. J. L. 286.

The statute did not require the vaccination and revaccination of all the inhabitants, without discrimination, but left the matter to the discretion of the local authorities. This was an unobjectionable method of legislation.

See Field *v.* Clark, 143 U. S. 649, 693, 694.

The order of the board of health, pursuant to the statute, was not an undiscriminating rule that every inhabitant of the city must get himself vaccinated before a certain time, notwithstanding his condition of health, which might be such that to undergo vaccination would be dangerous, but was in the nature of a resolve that all who had not been successfully vaccinated since March 1, 1897, ought to be vaccinated. Without further steps on the part of the board, no person would be liable to a penalty, because there was, as yet, no definite requirement with which any person could refuse or neglect to comply; as yet there was no possible denial of rights secured by the Federal Constitution.

Then the board of health required the plaintiff in error to be vaccinated, offering to vaccinate him free of expense, but he arbitrarily refused. In this actual administration of the power conferred by the statute, nothing unconstitutional is shown.

V.

Since the statute authorizing vaccination, the order of the board of health in conformity with the statute and the discretionary administration of the order, so far as appears, were all free from arbitrary or unequal operation, the judgment of the superior court of Massachusetts ought to be affirmed.

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